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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

EX PARTE

The Hon. Reed E. Hundt
Chairman
Federal Communications Commission
1919 M Street, N.W. - Room 814
Washington, D.C. 20554

Re: CC Docket No. 87-266; CC Docket No. 94-1

Dear Chairman Hundt:

I understand that the Commission is seriously considering imposing Title VI requirements on video dialtone systems over which an affiliate of the telephone company provides programming. In previous filings with the Commission, Bell Atlantic has explained why we do not believe that this result is compelled by existing law. If the Commission were to reach a contrary conclusion, however, Bell Atlantic would be unlikely to provide video dialtone service in the future for the following reasons:

- Compliance with dual pre-approval processes under Federal Section 214 requirements and local franchising requirements would significantly delay entry into the video market;

- Compliance with additional regulatory requirements applicable only to the telephone company affiliate would seriously and unfairly handicap the telephone company in competing with other programmers on the video dialtone network;

- Telephone companies would be required to comply with two different sets of burdensome regulations, while the incumbent cable operator would have to comply only with one set of regulations or, in some instances, could escape regulation altogether -- creating a serious competitive disadvantage for the telephone company; and

- It would be technically impossible, in some instances, for video dialtone systems to comply with certain Title VI requirements due to the nature of the technologies used in providing video dialtone service.

Published reports indicate that the Commission is considering imposing Title VI requirements on the telephone company's affiliate while simultaneously regulating the telephone company as a common carrier under Title II. (A summary of those requirements is shown in the chart attached as Exhibit A.) If the Commission were to do so, telephone companies would be required to undergo two parallel, redundant and lengthy processes to obtain authorization to enter the market -- the 214 process at the Federal level, and the franchise process at the local level. Although telephone companies have already obtained permission to use the public rights-of-way to deliver current and future services to their customers under their existing telephone franchises, they would have to obtain permission again from local franchising authorities to use those <u>same</u> rights-of-way just to provide yet another regulated service. Such franchising proceedings, on average, take months or even years -- further unnecessarily delaying telephone companies' entry into the video market.

Contrary to cable's claims, telephone companies are not trying to avoid paying franchising fees. Bell Atlantic has supported legislation at both the Federal and state level that would permit cities to assess taxes equal to the incumbent cable operator's franchise fee on video dialtone service, and prevent any revenue loss by local municipalities

In addition, only the video programming affiliate of the telephone company -- but no other programmer on the video dialtone network -- would be required to comply with a host of additional Title VI regulations. For example, the affiliate would also be required to comply with the Commission's "must carry" and PEG programming, program access, leased access, syndicated exclusivity and network non-duplication, emergency broadcast system, customer service, and signal quality rules and other Title VI requirements.

As a Federal appellate court has concluded, many of these Title VI obligations make no sense when applied to a common carrier video dialtone system. For example, it would be ludicrous to impose leased access requirements on the telephone company affiliate -- requiring it to make a certain amount of its capacity available for lease by the public -- when the video dialtone network itself is nothing but a leased access facility. Similarly, the must carry and PEG programming rules under Title VI were designed to guarantee continued market access for broadcasters and PEG programmers to closed proprietary cable systems over which the cable operator otherwise exercises complete editorial discretion. There is no need to mandate that a telephone company affiliate carry such stations when they already have the right to obtain carriage on the video dialtone network under tariff.

Many Title VI requirements, designed for traditional cable systems, also make no sense when applied to video dialtone systems that may use completely different technology to offer unique services. For example, Bell Atlantic's current video dialtone market trial in northern Virginia delivers pre-recorded movies on demand over, in effect, a single channel to multiple subscribers using asymmetric digital subscriber line ("ADSL") technology. Bell Atlantic could not technically comply with must carry and PEG requirements under Title VI on that ADSL system because ADSL technology is not yet capable of delivering "live" or real time programming. Nor could it comply with the emergency broadcast system requirements under Title VI, which are designed for analog non-common carrier systems.

The economic consequences of dual regulation would be devastating for video dialtone providers. These new rules would layer an entirely new set of burdensome and expensive Title VI requirements on only the telephone company affiliate, driving up the affiliate's costs of doing business and in turn, its prices to consumers. The affiliate would be severely handicapped in competing with other programmers on the network and with the cable incumbent.

The cable industry repeatedly asserts that, if telephone companies are allowed to provide video programming over their video dialtone networks without obtaining a cable franchise and meeting other Title VI requirements, they would have an unfair advantage over cable companies. The facts are to the contrary. It is telephone companies that would be at a severe disadvantage as they would have to comply with both Title II and Title VI requirements, while cable would only have to comply with Title VI. Moreover, if a cable operator chooses to move to the telephone company's open common carrier video dialtone platform to distribute its service, that cable company could escape <u>both</u> Title II and Title VI regulation. This is not farfetched: one of the programmers that has reserved programming on Bell Atlantic's video dialtone network in Dover, New Jersey is a cable affiliate.

Moreover, even under existing rules, the incumbent cable operator will escape rate regulation as soon as video dialtone providers enter the market to provide effective competition, yet the telephone company will continue to be saddled with price regulation and related Part 69 and tariff requirements.

Critics also claim that telephone companies should not complain because cable operators will also be subject to dual regulation under Title II and Title VI when they begin offering telephone service. While this is true, it is based on drawing the wrong comparison. Using cable's logic, telephone companies would then be subject to <u>triple</u> regulation: once under Title II for telephone service, and again, unlike cable, twice under both Title II and VI for video service .

The Commission has previously concluded, and a Federal appellate court has affirmed, that Title VI is inapplicable to common carrier systems because they are fundamentally different from the closed cable systems regulated by Title VI. For reasons explained at greater length in previous filings with the

Commission, Bell Atlantic does not believe that the presence of an affiliated programmer changes the fundamental nature of a video dialtone network. It is still a common carrier system, with the telephone company affiliate purchasing service, just like any other programmer, under tariffed nondiscriminatory terms.

If, however, the Commission believes that it is compelled by existing law to impose dual regulatory restrictions that will sound the death knell of video dialtone, it should wait for Congress to complete action on pending Federal telecommunications legislation. That legislation clearly reveals Congress' desire to impose less regulation on this fledgling industry in order to promote competition. In fact, the Senate specifically provides that these open common carrier platforms should not be regulated as cable systems, whether or not an affiliate is a programmer. Section 202 of the Senate bill (S. 652), a copy of which is attached, which was passed by an overwhelming majority (81-18), provides:

> "To the extent that any [telephone company]...provides video programming that it owns, controls or selects directly to subscribers, through a common carrier video platform, neither the telecommunications carrier nor any video programming provider making use of such platform shall be deemed to be a cable operator providing cable service."

The House bill (H.R. 1555) also confirms that video dialtone systems with affiliated programmers would not be subject to local cable franchising requirements. A contrary decision by the Commission at this time would not create any certainty for business planning purposes; to the contrary, it would create short-term confusion and greater uncertainty while companies still awaited congressional action. But if Congress failed to act, the harm would be done: the Commission's imposition of dual regulation would likely force telephone companies to abandon the video dialtone model permanently and instead deploy closed cable systems.

Bell Atlantic urges the Commission to follow the lead of Congress in clearing away regulatory barriers to competition. The way Americans will work, play and learn in the future depends on it.

Sincerely,

Attachments

cc: Blair Levin
John Nakahata
Kathleen Wallman
Richard Metzger
James Schlichting

The Burdens of Dual Title II/Title VI Regulation on Telcos Providing Programming

Title II	Title VI
♦ Must obtain Federal authorization to construct facilities under Section 214	♦ Must also obtain local authorization to construct facilities from each franchising authority
♦ Must obtain permission to use public rights-of-way to deliver services to customers. (Most telcos already have use of ROW under existing state franchises.)	♦ Must again obtain permission to use same rights-of-way to provide VDT through local franchise process.
♦ Entire VDT platform is available for "leased access" by any individual or entity under tariffed terms and conditions without discrimination.	♦ Telco affiliate but no other VIP on VDT system, even the incumbent cable operator, must also: -- Make part of its own channel capacity available for leased access; -- Provide a portion of its capacity to "must carry" and PEG programmers; and -- Comply with additional Title VI rules, such as emergency broadcast system, program access, syndicated exclusivity and network nonduplication rules, and customer service and signal quality standards.
♦ Even though its cable competitors are no longer subject to rate regulations once VDT provide effective competition, telcos continue to be subject to Part 69 and tariff requirements that provide little flexiblility to be price-competitive and market-responsive.	

EXHIBIT A

SEC. 202. ELIMINATION OF CABLE AND TELEPHONE COMPANY CROSS-OWNERSHIP RESTRICTION.

(a) In General: Section 613(b) (47 U.S.C. 533(b)) is amended to read as follows:

`(b) Video Programming and Cable Services:

`(1) Distinction between video platform and cable service: To the extent that any telecommunications carrier carries video programming provided by others, or provides video programming that it owns, controls, or selects directly to subscribers, through a common carrier video platform, neither the telecommunications carrier nor any video programming provider making use of such platform shall be deemed to be a cable operator providing cable service. To the extent that any telecommunications carrier provides video programming directly to subscribers through a cable system, the carrier shall be deemed to be a cable operator providing cable service.

`(2) Bell operating company activities:

`(A) Notwithstanding the provisions of section 252, to the extent that a Bell operating company carries video programming provided by others or provides video programming that it owns, controls, or selects over a common carrier video platform, it need not use a separate affiliate if--

`(i) the carrier provides facilities, services, or information to all programmers on the same terms and conditions as it provides such facilities, services, or information to its own video programming operations, and

`(ii) the carrier does not use its telecommunications services to subsidize its provision of video programming.

`(B) To the extent that a Bell operating company provides cable service as a cable operator, it shall provide such service through an affiliate that meets the requirements of section 252 (a), (b), and (d) and the Bell operating company's telephone exchange services and exchange access services shall meet the requirements of subparagraph (A)(ii) and section 252(c); except that, to the extent the Bell operating company provides cable service utilizing its own telephone exchange facilities, section 252(c) shall not require the Bell operating company to make video programming services capacity available on a non-discriminatory basis to other video programming services providers.

`(C) Upon a finding by the Commission that the requirement of a separate affiliate under the preceding subparagraph is no longer necessary to protect consumers, competition, or the public interest, the Commission shall exempt a Bell operating company from that requirement.

`(3) Common carrier video platform: Nothing in this Act precludes a telecommunications carrier from carrying video programming provided by others directly to subscribers over a common carrier video platform. Nothing in this Act precludes a video programming provider making use of a common carrier video platform from being treated as an operator of a cable system for purposes of section 111 of title 17, United States Code.

`(4) Rates; access: Notwithstanding paragraph (2)(A)(i), a provider of common carrier video platform services shall provide local broadcast stations, and to those public, educational, and governmental entities required by local franchise authorities to be given access to cable systems operating in the same market as the common carrier video platform, with access to that platform for the transmission of television broadcast programming at rates no higher than the incremental-cost-based rates of providing such access. Local broadcast stations shall be entitled to obtain access on the first tier of programming on the common carrier video platform. If the area covered by the common carrier video platform includes more than one franchising area, then the Commission shall determine the number of channels allocated to public, educational, and governmental entities that may be eligible for such rates for that platform.

`(5) Competitive neutrality: A provider of video programming may be required to pay fees in lieu of franchise fees (as defined in section 622(g)(1)) if the fees--

`(A) are competitively neutral; and

`(B) are separately identified in consumer billing.

`(6) Acquisitions; joint ventures; partnerships; joint use of facilities:

`(A) Local exchange carriers: No local exchange carrier or any affiliate of such carrier owned by, operated by, controlled by, or under common control with such carrier may purchase or otherwise acquire more than a 10 percent financial interest, or any management interest, in any cable operator providing cable service within the local exchange carrier's telephone service area.

`(B) Cable operators: No cable operator or affiliate of a cable operator that is owned by, operated by, controlled by, or under common ownership with such cable operator may purchase or otherwise acquire, directly or indirectly, more than a 10 percent financial interest, or any management interest, in any local exchange carrier providing telephone exchange service within such cable operator's franchise area.

`(C) Joint Venture: A local exchange carrier and a cable operator whose telephone service area and cable franchise area, respectively, are in the same market may not enter into any joint venture or partnership to provide video programming directly to subscribers or to provide telecommunications services within such market.

`(D) Exception: Notwithstanding subparagraphs (A), (B), and (C) of this paragraph, a local exchange carrier (with respect to a cable system located in its telephone service area) and a cable operator (with respect to the facilities of a local exchange carrier used to provide telephone exchange service in its cable franchise area) may obtain a controlling interest in, management interest in, or enter into a joint venture or partnership with such system or facilities to the extent that such system or facilities only serve incorporated or unincorporated--

`(i) places or territories that have fewer than 50,000 inhabitants; and

`(ii) are outside an urbanized area, as defined by the Bureau of the Census.

`(E) Waiver: The Commission may waive the restrictions of subparagraph (A), (B), or (C) only if the Commission determines that, because of the nature of the market served by the affected cable system or facilities used to provide telephone exchange service--

`(i) the incumbent cable operator or local exchange carrier would be subjected to undue economic distress by the enforcement of such provisions,

`(ii) the system or facilities would not be economically viable if such provisions were enforced, or

`(iii) the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

`(F) Joint use: Notwithstanding subparagraphs (A), (B), and (C), a telecommunications carrier may obtain within such carrier's telephone service area, with the concurrence of the cable operator on the rates, terms, and conditions, the use of that portion of the transmission facilities of such a cable system extending from the last multiuser terminal to the premises of the end user in excess of the capacity that the cable operator uses to provide its own cable services. A cable operator that provides access to such portion of its transmission facilities to one telecommunications carrier shall provide nondiscriminatory access to such portion of its transmission facilities to any other telecommunications carrier requesting such access.

`(G) Savings clause: Nothing in this paragraph affects--

`(i) the authority of a local franchising authority (in the case of the purchase or acquisition of a cable operator, or a joint venture to provide cable service) or a State Commission (in the case of the acquisition of a local exchange carrier, or a joint venture to provide telephone exchange service) to approve or disapprove a purchase, acquisition, or joint venture, or

`(ii) the antitrust laws, as described in section 7(a) of the Telecommunications Competition and Deregulation Act of 1995.'.

(b) No Permit Required for Video Programming Services: Section 214 (47 U.S.C. 214) is amended by adding at the end thereof the following:

`(e) Special Rule: No certificate is required under this section for a carrier to construct facilities to provide video programming services.'.

(c) Safeguards: Within one year after the date of enactment of this Act, the Commission shall prescribe regulations that--

(1) require a telecommunications carrier that provides video programming directly to subscribers to ensure that subscribers are offered the means to obtain access to the signals of local broadcast television stations identified under section 614 as readily as they are today;

(2) require such a carrier to display clearly and prominently at the beginning of any program guide or menu of program offerings the identity of any signal of any television broadcast station that is carried by the carrier;

(3) require such a carrier to ensure that viewers are able to access the signal of any television broadcast station that is carried by that carrier without first having to view advertising or promotional material, or a navigational device, guide, or menu that omits broadcasting services as an available option;

(4) except as required by paragraphs (1) through (3), prohibit such carrier and a multichannel video programming distributor using the facilities of such carrier from discriminating among video programming providers with respect to material or information provided by the carrier to subscribers for the purposes of selecting programming, or in the way such material or information is presented to subscribers;

(5) require such carrier and a multichannel video programming distributor using the facilities of such carrier to ensure that video programming providers or copyright holders (or both) are able suitably and uniquely to identify their programming services to subscribers;

(6) if such identification is transmitted as part of the programming signal, require a telecommunications carrier that provides video programming directly to subscribers and a multichannel video programming distributor using the facilities of such carrier to transmit such identification without change or alteration;

(7) prohibit such carrier from discriminating among video programming providers with regard to carriage and ensure that the rates, terms, and conditions for such carriage are just, reasonable, and nondiscriminatory;

(8) extend to such carriers and multichannel video programming distributors using the facilities of such carrier the Commission's regulations concerning network nonduplication (47 C.F.R. 76.92 et seq.) and syndicated exclusivity (47 C.F.R. 76.171 et seq.); and

(9) extend to such carriers and multichannel video programming distributors using the facilities of such carrier the protections afforded to local broadcast signals in section 614(b)(3), 614(b)(4)(A), and 615(g)(1) and (2) of such Act (47 U.S.C. 534(b)(3), 534(b)(4)(A), and 535(g)(1) and (2)).

(d) Enforcement: The Commission shall resolve disputes under subsection (c) and the regulations prescribed under that subsection. Any such dispute shall be resolved with 180 days after notice of the dispute is submitted to the Commission. At that time, or subsequently in a separate proceeding, the Commission may award damages sustained in consequence of any violation of this section to any person denied carriage, or require carriage, or both. Any aggrieved party may also seek any other remedy available under the law.

(e) Effective Dates: The amendment made by subsection (a) takes effect on the date of enactment of this Act. The amendment made by subsection (b) takes effect 1 year after that date.